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U.S. Citizenship
and Immigration
Services

01

FILE:

SRC 03 073 51355

Office: TEXAS SERVICE CENTER

Date: JAN 26 2005

IN RE:

Petitioner:

Beneficiary:

PETITION: Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a missionary. The director determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition, that the position qualified as that of a religious worker, or that the petitioner had the ability to pay the beneficiary the proffered wage.

On appeal, the petitioner submitted a brief and additional documentation.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The regulation at 8 C.F.R. § 204.5(m)(1) echoes the above statutory language, and states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file a Form I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States." The regulation indicates that the "religious workers must

have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition.”

The regulation at 8 C.F.R. § 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

(ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:

(A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

The petition was filed on January 13, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a missionary throughout the two-year period immediately preceding that date.

The petitioner stated that the beneficiary has been working for the petitioning organization since January 1999, that she attended a two-year training program from February 14, 1999 to December 24, 2000, and upon completion of her training, “returned to help us with the spiritual needs of our Spanish-speaking members and our campus out-reach” program at the University of Austin at Texas. The petitioner submitted a work schedule for its full-time religious workers, which reflect a total of 55 hours. The petitioner also submitted copies of a 2001 and 2002 Form 1099-MISC that it issued to the beneficiary, indicating nonemployee compensation of \$14,350 and \$13,740 respectively, and copies of canceled checks indicating that it paid the beneficiary \$1,200 in each month of the year 2002.¹

The director determined that, as the beneficiary had worked as an independent contractor for the petitioner, it could not be established that the beneficiary had worked continuously in the religious occupation for two full years preceding the filing of the visa petition.

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of “a number of safeguards . . . to prevent abuse.” See H.R. Rep. No. 101-723, at 75 (1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged “principally” in such duties. “Principally” was defined as more than 50 percent of the person’s working time. Under prior law a minister of religion was required to demonstrate that he/she had been “continuously” carrying on the vocation of minister for the two years

¹ The petitioner provides no explanation of the difference in the total amount allegedly paid to the beneficiary by check in 2002 and the amount it reported on the Form 1099-MISC. The beneficiary reported gross income of \$13,740 on her 2002 Form 1040NR, U.S. Nonresident Alien Income Tax Return.

immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

On appeal, the petitioner states that, although it has paid the beneficiary in the past as an independent contractor, the beneficiary is really an employee based on the twenty factors test established by the Internal Revenue Service (IRS). The petitioner further states that it has changed the reporting status for its missionaries, and will now report them to the IRS as employees rather than as independent contractors. The petitioner submitted a letter from a Certified Public Accountant, in which he states that he advised the petitioner that its missionaries were indeed employees instead of independent contractors, and that it needed to change its reporting status for these individuals. The petitioner also submitted copies of what it indicates are paycheck stubs for the beneficiary from January 2003 through September 2003, reflecting that it now compensates the beneficiary as an employee and deducts the appropriate tax withholdings from her paycheck. Although the petitioner submitted copies of its Form 941, Employer's Quarterly Federal Tax Return, dated June 26, 2003 and July 31, 2003, they provide no conclusive evidence that the petitioner has included the beneficiary in its reports of wages and other compensation.

The statute requires that an alien must be seeking entry into the United States to work for a bona fide religious organization. That requirement is not met when the individual is self-employed as the individual works for him/herself. Therefore, self-employment is not qualifying employment for purpose of this visa preference classification. However, self-employment may be qualifying employment for purposes of establishing the two years required work experience.

We find that the evidence is sufficient, in the present case, to establish that the beneficiary's prior employment as an independent contractor is qualifying employment to establish experience in the religious occupation.

The petitioner submitted copies of the beneficiary's personal weekly schedules for the period September 3, 2001 to November 11, 2003.² According to the petitioner, these hours reflect the number of hours that the beneficiary was engaged in "shepherding" individuals and the number of hours spent in other activities such as preaching and teaching. The beneficiary was also required to spend 17 ½ to 18 ½ hours per week in other work activities such as meetings, ministry readings, and "gospel," and approximately 13 hours in other church activities such as morning watch, prophesying meeting, prayer meeting, and home meeting/visiting saints in their homes.

The evidence is sufficient to establish that the beneficiary worked continuously in the religious occupation for two full years prior to the filing of the visa petition.

According to 8 C.F.R. § 204.5(m)(1), the alien must be coming to the United States at the request of the religious organization to work in a religious occupation. The director determined that the petitioner had not established that the proffered position is a religious occupation.

² The latest weekly work schedule submitted by the petitioner indicates it covered a period from May 5, 2003 to November 11, 2003. This appears to be a typographical error that does not affect our analysis of the documentation.

To establish eligibility for special immigrant classification, the petitioner must establish that the specific position that it is offering qualifies as a religious occupation as defined in these proceedings. The statute is silent on what constitutes a "religious occupation" and the regulation states only that it is an activity relating to a traditional religious function. The regulation does not define the term "traditional religious function" and instead provides a brief list of examples. The list reveals that not all employees of a religious organization are considered to be engaged in a religious occupation for the purpose of special immigrant classification. The regulation states that positions such as cantor, missionary, or religious instructor are examples of qualifying religious occupations. Persons in such positions would reasonably be expected to perform services directly related to the creed and practice of the religion. The regulation reflects that nonqualifying positions are those whose duties are primarily administrative or secular in nature. The lists of qualifying and nonqualifying occupations derive from the legislative history. H.R. Rpt. 101-723, at 75 (Sept. 19, 1990).

CIS therefore interprets the term "traditional religious function" to require a demonstration that the duties of the position are directly related to the religious creed of the denomination, that the position is defined and recognized by the governing body of the denomination, and that the position is traditionally a permanent, full-time, salaried occupation within the denomination.

The petitioner, who states that it has no governing body over it, enumerated the qualifications that it requires of those religious workers serving as missionaries within its organization. They include a minimum age requirement, minimum educational requirements, a minimum period of religious affiliation, and unanimous approval by the petitioner's board of elders. The petitioner also indicates that the applicant must have the "capacity for intensive religious training and service." It submitted evidence that the beneficiary had a college degree and attended a two-year religious training program. The petitioner submitted evidence that the duties of the proffered position required an approximate 55-hour workweek, and that the beneficiary had been compensated for her services.

The evidence sufficiently establishes that the proffered position is a religious occupation within the meaning of the regulation.

The petitioner must also establish that it has the ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner stated that it compensates the beneficiary at the rate of \$14,400 per year. The pay stubs submitted by the petitioner reflects that it paid the beneficiary \$1,115.80 per month during the months of January through September 2003. On appeal, the petitioner also submitted a copy of an audited financial statement for the period ending June 2003.

The record is sufficient to establish that the petitioner has the ability to pay the beneficiary the proffered wage, and that the beneficiary is otherwise qualified for the visa preference classification.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is sustained. The petition is approved.